No. 21809

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON SAVINGS AND LOAN ASSOCIATION, etc.,
Appellant,

vs.

LIFETIME SAVINGS AND LOAN ASSOCIATION, etc.,
Appellee.

APPELLANT'S OPENING BRIEF.

McKENNA & FITTING,
AARON M. PECK,
427 West Fifth Street,
Los Angeles, Calif. 90013,
Attorneys for Appellant

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 21809

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON SAVINGS AND LOAN ASSOCIATION, etc.,
Appellant,

vs.

LIFETIME SAVINGS AND LOAN ASSOCIATION, etc.,
Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

The United States District Court of the Central District of California (hereinafter referred to as "the Court below") had jurisdiction over the action from which the instant appeal is taken pursuant to 28 U.S.C. Sections 1332 and 2201. There was a diversity of citizenship between Plaintiff Jefferson Savings and Loan Association (hereinafter referred to as "Jefferson"), a Colorado corporation, and Defendant Lifetime Savings and Loan Association (hereinafter referred to as "Lifetime"), a California corporation, and the sum in controversy exceeded $10,000.00 [C. T. p. 2, line 27, to p. 3, line 5; p. 205, line 32, to p. 206, line 5].[1] Count I of the Complaint sets forth an actual contro-

[1] "C. T." refers to "Clerk's Transcript", "R. T." refers to "Reporter's Transcript".

versy between Jefferson and Lifetime as to which Jefferson sought a declaration of its legal rights by the Court below [C. T. p. 2, line 21, to p. 3, line 29].

This Court has jurisdiction over the instant appeal pursuant to 28 U.S.C. Section 1291. It is an appeal from a final judgment of the Court below [C. T. pp. 212-214], and a notice of appeal was timely filed [C. T. p. 216].

Statement of the Case.

Jefferson and Lifetime[2] are state-chartered savings and loan associations organized and operating under the laws of Colorado and California, respectively [C. T. p. 2, line 29, to p. 3, line 5; p. 205, line 32, to p. 206, line 5].

In September of 1961, Jefferson and Lifetime entered into a "Loan Participation Agreement" (hereinafter referred to as "LPA") under which, for $358,242.92, Jefferson acquired from Lifetime a seventy-five per cent interest in thirty-seven existing loans secured by thirty-seven first deeds of trust on an equal number of parcels of real property [C. T. pp. 7-9; p. 206, lines 24-30]. In accordance with the terms of the LPA, Lifetime retained possession and control of all loan instruments, including notes and deeds of trust [C. T. p. 206, lines 31-32].

Lifetime was paid a fee for servicing the loans, consisting of all interest thereon in excess of 6.5% (the loans bore interest at rates varying from 7.2 to 7.8),

---

[2]Since the commencement of the action below, Lifetime has merged into Lincoln Savings and Loan Association and, pursuant to stipulation, the Court below has ordered that any judgment rendered herein against Lifetime should be binding on Lincoln [C. T. pp. 220-222].

all late fees, fees for change of mortgage statements and loan modifications, and 5% of all rentals collected on foreclosed property [C. T. pp. 9-10].

The LPA made specific provision for the rights of the parties in the event that Lifetime foreclosed a deed of trust, acquired the property at the trustee's sale, and thereafter sold it to a third party. It provided, *inter alia,* as follows:

> "17. Seller shall give prompt notice to Purchaser as to any default under the terms of any mortgage in which Purchaser has a participation interest. Seller may act upon any loan in default and the security property by any procedure which may be necessary in its sole discretion, including the acceptance of a deed in lieu of foreclosure or the purchase at a foreclosure sale or trustee's sale. Seller shall exercise the judgment of a prudent lender in Seller's lending area. Seller shall make an appraisal of the property within a reasonable time before taking any action affecting such loan in default. Seller may manage, maintain, or dispose of property so acquired in any manner which it shall deem necessary, the parties hereto sharing ratably in the income and expense thereof. *Upon such disposition of such property, Purchaser shall share ratably with Seller in the net proceeds of sale to the extent of Purchaser's share in the unpaid principal balance due on the loan.* It is further understood that it shall be within the sole discretion of Seller to determine whether foreclosure shall be pursuant to a power of sale, or through court action, and as to whether or not a deficiency judgment shall be obtained.
>
> * * *

23. Paragraph 17 hereof is hereby amended so that Purchaser may elect to have foreclosure proceedings instituted and carried to conclusion by Seller in accordance with this Agreement on any loan which has been delinquent for a period of three consecutive months." [C. T. p. 9; emphasis added].

In 1963, eight of the thirty-seven loans went into default for failure of the borrowers to discharge their loan obligations. Lifetime instituted foreclosure proceedings under the power of sale clause in the deeds of trust and, in due course, through purchase at the trustee's sales foreclosing the deeds of trust securing the loans, acquired legal title to eight parcels of real property [C. T. p. 207, lines 1-17].

In August of 1964, without notice to or consultation with Jefferson of any nature whatsoever, Lifetime sold the eight properties. The purchasers were David and Alberta Durham (hereinafter referred to as "the Durhams"). The sale was effected in two separate, but concurrent or almost concurrent, transactions: three properties were sold in one, the remaining five (together with six others in which Jefferson had no interest) in the other [C. T. p. 207, line 23, to p. 208, line 26].

The three properties which had a book value of $64,826.61, were sold for $60,000.00. Lifetime financed one hundred per cent of the purchase price and loaned the Durhams an additional $10,000.00 to be expended for rehabilitating the properties [C. T. p. 207, line 27, to p. 208, line 6; Pltf. Ex. 14].

The eleven properties were sold for $105,500.00 of which $49,450 was for the five properties in which Jefferson was interested. Again Lifetime financed one hundred per cent of the purchase price, but no cash advance to the Durhams was involved [C. T. p. 208, lines 11-26; Pltf. Ex. 11].

The sales agreement for the eleven properties contained a provision governing the release of individual parcels from Lifetime's encumbrance:

> "Association [Lifetime] will cause individual parcels to be released from said deed of trust upon the payment of the following sums:
>
> "1. Upon the payment of the amount specified as 'Ninety Day Price' if paid within ninety days from the date hereof, and in such case there shall be credited against said note the amount specified in 'Long Term Price.'
>
> "2. Upon the payment of 115% of the amount specified as 'Long Term Price,' less any amortization of principal in the meantime, if said payment is made after ninety days from the date hereof.
>
> "3. No parcels shall be released at any time the aforesaid note is in default." [Pltf. Ex. 12].

The sales closed on August 19, 1964. Title to all properties was conveyed from Lifetime to the Durhams.

The Durhams executed notes to Lifetime in the amount of $70,000.00 and $105,500.00, each bearing interest at the rate of 6.6% per annum, and secured by first deeds of trust on the three properties and the eight properties respectively. Title policies insuring Lifetime as beneficiary under the deeds of trust and the Durhams as owners of the properties were issued [C. T. pp. 88-116].

On August 25, 1964, six days later, Lifetime remitted to Jefferson its seventy-five per cent of the sales price of the three properties, $45,092.80,[3] but not its seventy-five per cent share of the sales price of the other five properties. The excuse which it offered contained in a letter from Lifetime to Jefferson, revolved around the existence of the "ninety day price" release option:

> "Don . . . the sale of Real Estate Owned properties about which we talked when you were here has actually been consummated.
>
> "I enclose a Photostat copy of the sales agreement that was used. A total of eleven properties were involved and your Association was interested in five of them (old Loan No's. 433, 469, 438, 475 and 476; REO No's. 49, 68, 69, 81 and 82, respectively). We also enclose a Xerox copy of the closing statement.
>
> "You will note that the sales agreement provides for two sales prices: one in case we are paid off in cash before November 6, 1964; and one in case we are called upon to carry a long term Loan to Facilitate. The escrow was closed on the basis of the long term loan, however, as you will note by the copy of the closing statement attached.
>
> "Until the purchaser's performance as of November 6 is determined, we are unable to offer your Association any reasonable settlement except your proportionate share of the collected payments on

[3]The excess over seventy-five per cent of $60,000.00 is accounted for by the proceeds of an insurance claim for damage to the properties which was included in computing the amount due Jefferson [Pltf. Ex. 14].

the $105,500.00 loan. In the event that Reverend Durham is able to take advantage of the 90 day price, it would appear that your Association would receive 75% of the net sales proceeds of $31,-099.15." [Pltf. Ex. 11].

Conveniently overlooked by Lifetime was the fact that the sales agreement also permitted Lifetime to exact a premium in the amount of fifteen per cent of the sales price in the event that the Durhams wished to pay off the encumbrance *after* ninety days [Pltf. Ex. 12].

The Durhams did not take advantage of the "ninety day price." Ultimately, the notes which they gave went into default and Lifetime accepted a "deed in lieu of foreclosure" to the eleven properties [R. T. p. 122, line 24, to p. 123, line 19].

Lifetime refused to pay Jefferson its ratable share of either the ninety day price or the sales price, despite Jefferson's repeated and progressively more insistent demands upon it. [see Pltf. Exs. 17, 18, 19, 20, 28, 29 and 30].

On August 26, 1965 Jefferson filed the action in the Court below from which the instant appeal is taken [C. T. pp. 2-11]. Count I was for declaratory relief under 28 U.S.C. Section 2201 and sought a declaration of the respective rights and duties of the parties under the LPA in the event that Lifetime purchased property subject thereto at foreclosure sales and thereafter disposed of it. As stated in the Complaint:

"The defendant [Lifetime] contends that it has no duty to pay to the plaintiff [Jefferson] seventy-five per cent (75%) of the selling price (less the plaintiff's share of the applicable costs and

expenses of sale) obtained by the defendant in exchange for the real property which is the subject of the Loan Participation Agreement to which the defendant obtains title at a trustee's sale at foreclosure and thereafter sells and conveys to a third party. Plaintiff disputes said contention." [C. T. p. 3, lines 21-26].

Count II, an action for breach of contract, sought damages against Lifetime for its failure to remit to Jefferson seventy-five per cent of the sales price of the five properties purchased by the Durhams. Jefferson alleged that Lifetime, having acquired the properties through foreclosure at trustee's sales foreclosing deeds of trust of which it was beneficiary "conveyed the five (5) parcels * * * [to the Durhams] for the sum of $49,450." As a result, Lifetime was obligated, under the LPA, "to remit and pay to the plaintiff [Jefferson] seventy-five per cent (75%) of said sum, or the sum of $37,087.50 (less the plaintiff's share of the costs and expenses of sale)" [C. T. p. 4, lines 11-18].[4]

Lifetime's Answer, filed on September 16, 1965, denied the interpretation placed upon the disputed provision of the LPA by Jefferson; and, while admitting the foreclosures and resale to the Durhams, alleged by Jefferson in Count II, denied that it was obligated as a result of the sale to pay Jefferson any sum whatever [C. T. pp. 12-15].

---

[4]To avoid unnecessary repetition, Jefferson will not hereafter allude to this reduction for costs and expenses of sale; any reference to Jefferson's claimed damages is understood to be properly reduced by its share of the costs and expenses of the sale to the Durhams, found by the trial court to be $325.85 [C. T. p. 209, lines 9-11].

Both counts were tried, in a four-day trial, in October of 1966 before the Honorable Harry Westover [R. T. pp. 1-534]. With regard to Count I, there was introduced without objection, considerable extrinsic evidence relevant to the question of the intent of the parties concerning the disputed provision of the LPA. At the conclusion of the trial, Judge Westover held that Jefferson's interpretation of the provision was correct and that Lifetime's was incorrect: When Lifetime, without Jefferson's consent, sold property which was the subject of the LPA, and which it had acquired through foreclosure, it was obligated to pay over to Jefferson its ratable share of the net proceeds of the sale [C. T. p. 212, line 32, to p. 213, line 26].

Lifetime has not appealed from the Court's judgment as to the appropriate interpretation of the LPA under Count I. Hence, the instant appeal is concerned solely with the amount due to Jefferson under Count II.

With respect to Count II, the Court found that the allegations of Jefferson were true: Lifetime had acquired title to the five properties in question at trustee's sales foreclosing the deeds of trust thereon and thereafter, without the consent of Jefferson, had sold the properties to the Durhams for $49,450.00 [C. T. p. 208, lines 11-26; Pltf. Ex. 16].

Nevertheless, it did not award Jefferson seventy-five per cent of the sales price of these parcels, which would have been $37,087.50. Rather, it held that because of a letter communication from *Lifetime to Jefferson,*

upon which *Jefferson* "relied", Jefferson was "estopped" to claim more than 75% of $31,099.15, or $23,324.36. The Court, in Finding 16, stated:

> "On August 25, 1964, Lifetime stated to Jefferson in writing that the latter would receive 75% of $31,099.15 in connection with the subject five (5) loans in the event that the Durhams took advantage of the 90 day purchase price on the eleven parcel agreement (Exhibit 11 in evidence). By reason of the fact that Jefferson introduced Exhibit 11 in evidence, it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it. Accordingly, since Jefferson did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, Jefferson is estopped to claim any sum in connection with the sale of the subject five (5) properties greater than 75% of $31,099.15, or $23,324.36." [C. T. pp. 208-209].

On December 30, 1966, Jefferson filed a timely notice of appeal [C. T. p. 216]. Jefferson contends that the District Court committed obvious error in limiting Jefferson's damages under Count II to $23,324.36 and not awarding it seventy-five per cent of the sales price, or $37,087.50.

Statement of Issues.

1. Did the Court below err, as a matter of law, in not awarding to Jefferson judgment under Count II in the principal amount of $37,087.50, plus interest thereon at the legal rate from August 25, 1964?

2. Did the Court below err, as a matter of law, in limiting the principal amount of the award to Jefferson under Count II to $23,324.36?

3. Did the Court below err, as a matter of law, in finding that Jefferson is estopped to claim any sum under Count II greater than seventy-five per cent (75%) of $31,099.15, which is $23,324.36?

4. Did the Court below err, as a matter of law, in finding that any representation of Lifetime had the effect of limiting the amount recoverable by Jefferson under Count II to seventy-five per cent (75%) of $31,099.15, which is $23,324.36?

5. Did the Court below err, as a matter of law, in finding, in Finding 16 of the Findings of Fact and Conclusions of Law, that: "By reason of the fact that Jefferson introduced Exhibit 11 in evidence it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it. Accordingly, since Jefferson did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, Jefferson is estopped to claim any sum in connection with the sale of the subject five (5) properties [the subject of Count II of the Complaint] greater than 75% of $31,099.15, or $23,324.36."?

6. Did the Court below err, as a matter of law, in finding that Jefferson had relied upon Lifetime's representation that Jefferson would be paid 75% of $31,099.15, or $23,324.36?

Specification of Errors.

1. The Court below erred, as a matter of law, in not awarding to Jefferson judgment under Count II of the Complaint in the principal amount of $37,087, plus interest thereon at the legal rate from August 25,

1964 (but less costs and expenses of the sale of the property which was the subject of said Count II in the amount of $325.85).

2. The Court below erred, as a matter of law, in limiting the principal amount of the award to Jefferson under Count II of the said Complaint to $23,-324.36.

3. The Court below erred, as a matter of law, in finding that Jefferson is estopped to claim any sum under Count II of the said Complaint greater than seventy-five percent (75%) of $31,099.15, which is $23,324.36.

4. The Court below erred, as a matter of law, in finding that any representation of Appellee Lifetime, had the effect of limiting the amount recoverable by Jefferson under Count II of the said Complaint to seventy-five percent (75%) of $31,099.15, which is $23,324.36.

5. The Court below erred, as a matter of law in finding, in Finding 16 of the Findings of Fact and Conclusions of Law, that:

> "By reason of the fact that Jefferson introduced Exhibit 11 in evidence it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it. Accordingly, since Jefferson did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, Jefferson is estopped to claim any sum in connection with the sale of the subject five (5) properties [the subject of Count II of the said Complaint] greater than 75% of $31,099.15, or $23,324.36."

ARGUMENT.

I.

The Court Below Determined That, Under the Terms of the LPA, When Properties Subject Thereto Were Acquired by Lifetime Through Foreclosure and Thereafter Sold to Third Parties, Lifetime Was Required to Remit Seventy-Five Per Cent of the Proceeds of the Sale to Jefferson. Five Properties Subject to the LPA Were Acquired by Lifetime and Resold for $49,450.00. Hence, Under the LPA, Jefferson Was Entitled to $37,087.50. The Court's Findings That Jefferson Was Estopped to Claim More Than Seventy-Five Per Cent of $31,099.15 Is Preposterous.

Count I of the Complaint sought an adjudication of the respective rights and duties of Lifetime and Jefferson under the LPA. In particular, there was presented to the Court the question of whether, when Lifetime acquired title to property subject to the LPA through foreclosure and then resold that property to a third person, it was under an obligation imposed by the LPA to pay to Jefferson seventy-five per cent of the selling price.

The District Court, based upon evidence adduced through four days of trial, determined that question in the affirmative: When Lifetime acquired, through foreclosure, title to real property which was subject to the LPA,

> "Lifetime holds such title as a tenant in common with Jefferson, with the former having an indivisible 25% interest and the latter having an indivisible 75% interest in such property." [C. T. p. 213, lines 10-12]

Under the terms of the LPA, Lifetime is required to obtain the written consent of Jefferson to a proposed sale of the subject properties [C. T. p. 213, lines 13-19]; and

> "In the event that Lifetime sells or disposes of any real property which had formerly secured the payment of any loan included within the LPA and which property had been acquired through foreclosure proceedings by Lifetime pursuant to the terms and provisions of the LPA, without the written consent of Jefferson, Jefferson is entitled to an immediate payment of 75% of the net sales proceeds obtained for such property by Lifetime." [C. T. p. 213, lines 20-26].

Therefore the sole issue presented on this appeal is whether or not the damages awarded to Jefferson under Count II are inadequate as a matter of law. Jefferson submits that they are.

The Court below found that Lifetime acquired the five properties in question through purchase at trustee's sales foreclosing the deeds of trust securing loans that were subject to the LPA; and that thereafter, Lifetime, without the consent of Jefferson, sold the five properties to the Durhams for a price of which $37,087.50 was seventy-five per cent. In view of the Court's interpretation of the LPA, these findings would appear to compel a judgment for Jefferson in the amount of $37,087.50.

But this was not the decision of the Court below. Instead, it awarded Jefferson seventy-five per cent of $31,099.15, or $23,324.36. The Court's stated justifi-

cation for this decision, anomalous on its face, was "estoppel"—an estoppel which arose *against Jefferson* because of a representation *by Lifetime:*

> "On August 25, 1964, Lifetime stated to Jefferson in writing that the latter would receive 75% of $31,099.15 in connection with the subject five (5) loans . . . (Exhibit 11 in evidence). By reason of the fact that Jefferson introduced Exhibit 11 in evidence, it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it. Accordingly, since Jefferson did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, Jefferson is estopped to claim any sum in connection with the subject five (5) properties greater than 75% of $31,099.15, or $23,324.36." [C. T. p. 208, line 32, to p. 209, line 9].[5]

---

[5]The irony of the Court's findings is accentuated by the fact that Lifetime's statement to Jefferson that it would receive "75% of the net sale proceeds of $31,099.15" was almost certainly a misstatement of its true intent, undoubtedly due to a typographical error. It is obvious from the letter that it was Lifetime's intention to pay Jefferson 75% of the "90 day price." The "90 day price" of the five properties was not $31,099.15, but rather $41,900.00. Seventy-five per cent of $41,900.00, less $325.85—the precise amount which the Court found to be the portion of expenses of the sale to the Durhams properly borne by Jeffrson—is $31,099.15.

Thus:

"90 day price"—$41,900.00	
75% of "90 day price"	$31,425.00
less costs and expenses of sale	325.85
Net	$31,099.15

Hence, the letter was undoubtedly intended to read "75% of the net sale proceeds *or* $31,099.15." The $31,099.15 figure in Lifetime's August 25 letter is circled and marked with a question mark by Jefferson on Jefferson's copy [See Pltf. Ex. 11], thus indicating that Jefferson recognized that the figure was erroneous.

In other words, Jefferson was estopped because of something that Lifetime told it upon which it, Jefferson, had supposedly relied.

The fallacy of this proposition is obvious. Estoppel is an equitable doctrine, under which a party who has misled another into changing his position may not be allowed to show that the representation which induced the change of position was untrue. It applies against the person who made the representation and not against the person to whom the representation was made:

> "Estoppel may be defined to be a bar by which a man is precluded from denying a fact in consequence of his own previous action which has led another to so conduct himself that, if the truth was established, that other would suffer."
>
> *Davenport v. Stratton,* 24 Cal. 2d 232, 243 (1944).

> ". . . one who acts to his detriment on the faith of conduct of the kind revealed here should be protected by estopping the party who has brought about the situation. . . ."
>
> *Goodman v. Dicker,* 169 F. 2d 684, 685 (D.C. Cir. 1948).

> "Estoppel is said to be the effect of the voluntary conduct of a party whereby he is precluded from asserting rights which perhaps otherwise might exist against another person who in good faith has relied upon such conduct and has been led thereby to change his position for the worse."
>
> *James Talcott, Inc. v. Associates Discount Corp.,* 302 F. 2d 443, 446 (8th Cir. 1962).

In short, a more flagrant misconstruction of the estoppel doctrine than that indulged in in the instant action is difficult to imagine.

But even if the unexplainable construction placed upon the estoppel doctrine by the Court below was correct, its application to the instant case for the purpose of limiting Jefferson's recovery to 75 per cent of $31,099.15 would still be erroneous.

First of all, estoppel is an affirmative defense which is waived unless it is pleaded. *Harrison v. Hanson,* 165 Cal. App. 2d 370, 378 (1958). Lifetime's answer contains nothing which could be construed as even remotely suggesting an estoppel plea [C. T. pp. 12-15].

Secondly, the record is bereft of evidence sufficient to support findings that essential elements of estoppel such as "reliance" are present. While the findings do allude to the subject of "reliance", the sole basis upon which the Court below predicated its finding that Jefferson had "relied" upon Lifetime's representation was that Jefferson had introduced into evidence the letter in which the representation was contained:

> "By reason of the fact that Jefferson introduced Exhibit 11 in evidence, it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it." [C. T. p. 209, lines 3-5].

Jefferson can only observe that if a finding of reliance as a required element of estoppel can arise against a litigant solely because the litigant introduced into evidence the document in which the representation is contained, litigants must indeed be circumspect as to the evidence which they bring before the court.

As a matter of fact, there could have been any number of reasons that Jefferson introduced Exhibit 11 into evidence, including the simple desire to bring before the court all communications between the parties relevant to the subject matter of the lawsuit regardless of the particular issues in the lawsuit to which they might pertain. The mere act of introduction in itself cannot under the dictates of either law or logic be regarded as probative of anything.[6]

Jefferson is mindful of the rule of appellate practice that a decision of the trial court will be upheld if the result is correct, even though the court's reasoning is erroneous.

> *Commissioner of Internal Revenue v. Slimson Mill Co.*, 137 F. 2d 286 (9th Cir. 1943).

But, in the instant case, there is no conceivable basis upon which to sustain the action of the Court below. Jefferson's claim rested upon a contract, the LPA. The Court construed the relevant portion of that contract and the construction is final and binding. Under the contract, when Lifetime sold LPA properties which it had acquired through purchase at trustee's sales, without Jefferson's consent, Jefferson was entitled to seventy-five per cent of the sales price. The Court below found, and the facts are really undisputed, that Lifetime sold the five properties in question which it had acquired through purchase at trustee's sales without Jefferson's consent, and the sale price was $49,450.00.

---

[6]Indeed, the fact that the $31.099.15 figure on Jefferson's original of the Lifetime letter is marked with a question mark would seem to require the opposite inference—that Jefferson realized that the figure was incorrect.

The appropriate measure of damages for breach of contract is the benefit which the aggrieved party would have obtained had the contract been performed in accordance with its terms.

B. C. Richter Contracting Co. v. Continental Can Co., 230 Cal. App. 2d 491, 505 (1964).

If Lifetime had properly discharged its obligation under the LPA, upon the sale of the five properties Jefferson would have received seventy-five per cent of $49,450.00, or $37,087.50. Hence, $37,087.50, less an allowance for expenses of sale of $325.85, is the only possible correct award to Jefferson under Count II.

II.

This Court Has the Power to Correct the Judgment of the Trial Court.

An appellate court has the power to amend an erroneous judgment, without remanding the case to the trial court.

Saulsberry v. Maddix, 125 F. 2d 430, 436 (6th Cir., 1942); cert. den. 317 U.S. 643;

Boyer v. Murphy, 202 Cal. 23, 35 (1927);

Stetson v. Sheehan, 52 Cal. App. 353, 362 (1921).

Thus, where there is error arising from a mistake of law in the amount of damages awarded to a plaintiff, and the record contains the data required to ascertain the correct damages, the appellate court will itself amend the judgment and thus dispose of the litigation.

Solomon v. Franco, 112 Cal. App. 679 (1931);

Feckenscher v. Gamble, 12 Cal. 2d 482, 500 (1938);

American-Hawaiian Eng. & Constr. Co. v. Butler, 17 Cal. App. 764 (1912).

In the instant case there is, as we have demonstrated in section I, *supra,* only one correct judgment possible. The Court below made findings, supported by uncontroverted evidence, as to the amount of seventy-five per cent of the sales price of the five properties and the amount of the expenses of sale which, under the terms of the LPA, are properly attributable to Jefferson. Hence the Court has all information required to enter a judgment for the proper amount.

Economy of judicial effort is important to the efficient administration of justice. It is apparent that obviating further proceedings in the Court below by correcting the error in question in this Court will best promote such economy.

III.

Conclusion.

For the foregoing reasons, Jefferson respectfully submits that the judgment from which this appeal is taken should be amended by the court to increase the principal amount of the damages awarded to Jefferson under Count II to $37,087.50, less $325.85, or $36,761.65.

Respectfully submitted,

McKenna & Fitting,
Aaron M. Peck,
By Aaron M. Peck,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

AARON M. PECK